

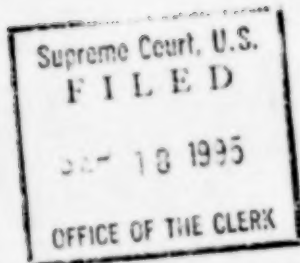
No. 95-6016

(2)

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1994



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LEM DAVIS TUGGLE, JR.,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN

Respondent.

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PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: Execution Date Scheduled September 21, 1995

QUESTIONS PRESENTED

A state psychologist interviewed Petitioner, a capital defendant, as the basis for an opinion that Petitioner posed a danger in the future. The interview was in violation of a trial court order and defense counsel were not notified. Once counsel became aware of the interview and prospective prosecution testimony, they sought to retain a defense expert to rebut the state's psychological testimony and assist in the sentencing defense. The trial court forbade Petitioner to engage an expert and allowed the state psychologist to testify in his capital sentencing that he posed a future danger. The jury found the "future dangerousness" aggravating circumstance and exercised its discretion, based on all evidence before it, to sentence the Petitioner to death.

The District Court concluded, inter alia, that (a) the state's use against Petitioner of psychological testimony based on an uncounseled interview violated Estelle v. Smith, 451 U.S. 454 (1981), and (b) the trial court's refusal to allow the defendant to retain his own defense expert violated Ake v. Oklahoma, 470 U.S. 68 (1985). The Court of Appeals accepted that the sentencing was unconstitutional, but affirmed the death sentence by invalidating the jury's "future dangerousness" aggravating circumstance and ruling that the sentencing jury's additional finding of the "vileness" aggravating circumstance sufficiently supported the

death sentence. This case accordingly presents the following questions:

1. When the state introduces expert testimony on psychiatric issues at a capital sentencing proceeding in violation of Estelle v. Smith, 451 U.S. 454 (1981), and when the indigent defendant has no opportunity to prepare a defense to such testimony because he was denied the assistance of an independent expert in violation of Ake v. Oklahoma, 470 U.S. 68 (1985), does Zant v. Stephens, 462 U.S. 862 (1983) allow the resulting unconstitutional death sentence to stand because there remains, ostensibly, one valid aggravating circumstance?
2. Was the "vileness" aggravating circumstance valid, notwithstanding that the jury and appellate court acted without any sufficient limiting construction of the same circumstance that this Court found facially unconstitutional in Godfrey v. Georgia, 446 U.S. 420 (1980)?
3. Under the rule of Turner v. Murray, 476 U.S. 28 (1986) and Mu'Min v. Virginia, 500 U.S. 415 (1991), may a trial court constitutionally refuse to conduct individualized voir dire of jurors or allow defense challenges for cause in a capital case when (a) members of the jury, including the foreman, had been publicly criticized by the prosecutor for rendering a lenient verdict in a murder trial that ended a few days before Petitioner's trial began; (b) jurors had been contacted by the press before trial and asked to justify their lenient verdict in the previous case; and (c) four jurors were exposed before trial to critically inaccurate and prejudicial press accounts of Petitioner's prior record?
4. When the prosecution's expert could not conclude whether penetration had occurred, could any "rational trier of fact" conclude that the Petitioner was guilty of rape, beyond a reasonable doubt?

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PETITION FOR WRIT OF CERTIORARI TO  
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Petitioner Lem Davis Tuggle, Jr. (Tuggle), a Virginia inmate under sentence of death, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit reversing a writ of habeas corpus granted him by the United States District Court for the Western District of Virginia.

#### OPINIONS BELOW

The opinion of the Court of Appeals is reported in Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 1995) and appears in Appendix A to this Petition. The opinion of the District Court for the Western District of Virginia is reported as Tuggle v. Thompson, 854 F. Supp. 1229 (W.D. Va. 1994) and appears in Appendix B to this Petition.

#### JURISDICTION

The Court of Appeals Opinion in this matter was filed on June 29, 1995. A timely Petition for Rehearing was filed on July 13, 1995. The Court of Appeals' denial of the Petition for Rehearing was issued on July 25, 1995 and is set forth in Appendix C. The Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

#### CONSTITUTIONAL PROVISIONS INVOLVED

Amendments V, VI, VIII and XIV to the United States Constitution are set forth in Appendix D.

#### STATEMENT OF THE CASE

Lem Davis Tuggle, Jr. was convicted of the capital offense of murder during the commission of rape and sentenced to die by the Circuit Court of Smyth County, Virginia in 1984. His case was so controversial that, even today, a framed copy of his death warrant adorns the wall of the Smyth County Circuit Court Record Room, the only document from any case in the county's history that is

displayed in that fashion. All courts that have considered this case have concluded that Tuggle was sentenced in violation of the United States Constitution. Indeed, the Virginia Attorney General conceded in 1985 that Tuggle was entitled to be re-sentenced. But, no re-sentencing has occurred and the Virginia Attorney General now presses for Petitioner's execution.

#### A) Tuggle's Trial

The offense for which Tuggle was convicted occurred on May 29, 1983. The victim died of a single gunshot wound to the chest. App. 123.<sup>1</sup> Semen was found in the victim's rectum, but there was no evidence of any injury there. App. 133, 143. No semen was found in the victim's vagina, but the examiner performing the autopsy testified at the preliminary hearing that the condition of the body suggested "either manipulation or penetration" of the vagina. App. 20. When pressed whether the condition was just as likely caused by manipulation as by penetration, the examiner testified "without the finding of seminal fluid, spermatozoa in the vaginal vault, I would say it would be just as likely. There is no way to determine." Id.

Upon motion of Tuggle's counsel, the trial court ordered state mental health professionals to examine Tuggle, explicitly confining the order to an examination of (1) Tuggle's sanity at the time of

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<sup>1</sup> Record citations refer to the Joint Appendix that the parties filed in the United States Court of Appeals for the Fourth Circuit. These references demonstrate that the federal issues pursued in this Petition were properly raised in the state trial court. Pursuant to Supreme Court Rule 14.1(g)(i), the specified record references are included as Appendix E to this Petition.

the offense and (2) his competence to stand trial. App. 30. The Virginia statute governing such examinations established that nothing said during the course of such an evaluation could be used against Tuggle at trial "as evidence or as a basis for such evidence" unless he elected to assert a defense based on diminished mental status. Va. Code § 19.2-169.

Tuggle was transferred to a state hospital where Doctor Arthur Centor interviewed him pursuant to the trial court's order and informed the court that, in his opinion, Tuggle was sane and could assist in his defense. App. 39-40. Centor also informed the court that he, of his own accord, had examined Tuggle to develop an opinion of the defendant's "future dangerousness." Centor did so even though the court order referring Tuggle for examination had not requested any such opinion, and defense counsel was not informed that such an evaluation would be made. App. 39-40, 191.

Upon learning about Dr. Centor's expanded examination of their client, Tuggle's counsel moved for evaluation by an independent psychiatrist to help them prepare a defense for Tuggle. App. 41-42. Trial counsel offered to pay for such an investigation from their own funds because the court had denied a previous request for such expert assistance. App. 28-29, 38. The trial court denied the motion. App. 57-62.

Several weeks before trial, Tuggle's counsel moved for a change of venue due to inaccurate and prejudicial publicity that the case had received in the months leading up to trial. App. 43. Some of the publicity wrongly stated that Tuggle had previously

been convicted of rape. App. 45-48. Another article reported that Tuggle was suspected of the rape of a young girl in a nearby county for which he was never charged. App. 46. These inaccuracies were critical because, without the rape charge, Tuggle would not have been charged with capital murder.<sup>2</sup> Three articles reported that capital murder in Virginia carried a mandatory death sentence. App. 46, 52, 116. The trial court denied the motion to change venue, conditioned on the ability to select an unbiased jury following voir dire. App. 74-76.

On the night before trial, Tuggle's counsel learned that some members of the venire from which the Tuggle jury was to be selected had been contacted by a member of the Sheriff's Department and by Terry Hawthorne, a reporter for the Smyth County News, apparently concerning their performance as jurors in a murder trial that had occurred a few days earlier. App. 78-79. In that trial, the jurors convicted the defendant of a crime less than the charged offense of first degree murder and the local prosecutor publicly criticized the jurors, calling their verdict a "travesty of justice." App. 79, 117-18.

On the morning of trial, Tuggle's counsel informed the trial court that the Sheriff and press had contacted members of the jury venire about the sufficiency of their verdict in the prior case. Id. Given the nature of the prosecutor's comments about the jurors, and the possibility of embarrassment and intimidation,

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<sup>2</sup> The capital charge in Tuggle's case was murder during the commission of rape. At the time, murder during the commission of sodomy was not a capital crime in Virginia.

defense counsel asked for the opportunity to voir dire the jury about such contacts or to summon those who had contacted members of the venire for questioning. App. 78-79. The trial court denied both requests. App. 79.

When the first twenty members of Tuggle's venire were called for voir dire, eight panel members immediately indicated in the presence of the other venire members that they had formed an opinion as to Tuggle's guilt. App. 82-84.<sup>3</sup> Once these jurors were excused, the venire still contained five members who had been contacted before trial either by a member of the Sheriff's Department or by a representative of the local media. App. 90-91. Ten members of the venire indicated that they had read articles about the Tuggle case, including the article that referred to a prior homicide and that contained the false reports that Tuggle had a previous rape conviction and was suspected in another rape case. App. 94-107. Despite counsel's request, the trial court refused to allow any individualized voir dire of these jurors and would not allow any questions about the content of what they had read. App. 80, 95.

After general questioning of the jury panel was complete, the trial court declared the panel qualified and told Tuggle's counsel to commence their peremptory strikes. App. 113-14. Tuggle's counsel asked for the opportunity to challenge jurors for cause outside their hearing, but the trial court refused to hear any

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<sup>3</sup> After excusing the eight jurors from the panel, the trial court once again refused to change the venue of the trial. App. 113.

challenges for cause. Id. The jury ultimately seated in Tuggle's case included at least five individuals who had read articles concerning the case (four read the article that contained the false rape information) and three individuals who were subject to pre-trial contacts. App. 89-114, 119.<sup>4</sup>

On the afternoon of the first day of trial, Tuggle's counsel received a copy of the Smyth County News of that day, confirming that some of the jurors who were sitting on Tuggle's jury had been contacted by the paper and asked to explain why they arrived at the assertedly lenient verdict in the murder case tried a few days before. App. 146. One of the jurors sitting on the Tuggle case, Robert Brown, was quoted as saying that the defendant should have received a maximum sentence rather than that actually imposed. App. 118. Mr. Brown was later selected foreman of the Tuggle jury. App. 245. Tuggle's counsel moved for a mistrial because of the article. The trial judge refused even to read the article and summarily denied the motion. App. 146, 149-50.

During the trial, the Commonwealth introduced expert testimony from its pathologist on the rape evidence. App. 120-44. The pathologist explained that there was no internal vaginal injury.

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<sup>4</sup> This is one of the few areas of factual dispute in the case. The Commonwealth contends that only one of the jurors, the foreman Robert Brown, had previously been contacted by the media. The trial transcript is admittedly murky on this point, but it appears that five members of the Tuggle venire (Catron, Anderson, Dunford, Eastridge and Brown) sat on the previous jury and all five had been contacted either by law enforcement or media representatives. App. 90. Catron and Anderson were struck, leaving the remaining three jurors to sit in Tuggle's trial. App. 119.

App. 139, 143. The prosecution elicited testimony that the condition of the body suggested penetration by "something, a penis, a finger, an object, something." App. 124. But, on cross-examination, the medical examiner admitted that the body's condition was consistent with either "manipulation or penetration" of the vagina. App. 143. Because the court had denied Tuggle's motion for an expert pathologist, the defense could put on no affirmative evidence challenging the rape charge. The jury convicted Tuggle of murder during the commission of rape. App. 245.

During the sentencing phase of Tuggle's trial, the prosecution called Dr. Arthur Centor to testify about Tuggle's future dangerousness. App. 185-87, 192-93, 199-205. Tuggle objected to the testimony on the ground that the trial court's commitment order had not authorized Centor to examine the defendant's future dangerousness, and defense counsel were given no notice that such an examination would take place. App. 188-191. The trial court overruled the objection and Centor testified that Tuggle showed "a high probability of future dangerousness." App. 202. Because defense counsel's repeated requests to retain an independent psychiatric expert, either at the state's or their own expense, had been denied, they could not offer evidence to counter the professional testimony of Dr. Centor.

In instructing the jury on the "vileness" aggravating circumstance, the trial court told the jury it could impose the death penalty if it found that Tuggle's conduct in committing the

crime "was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." App. 242. Tuggle's counsel sought specific instructions defining the terms "aggravated battery" and "depravity of mind" but the trial court refused to allow any definition. App. 244.

In closing argument at the sentencing phase of the trial, the Smyth County prosecutor relied heavily on Dr. Centor's testimony that Tuggle would endanger others in the future. App. 229, 233-34. The jury recommended a sentence of death, finding both the "vileness" and "future dangerousness" aggravating circumstances provided by Virginia law. App. 245; Va. Code 19.2-264.4(C).

#### B) Tuggle's Direct Appeal

The Virginia Supreme Court affirmed Tuggle's conviction and sentence on appeal, relying on Dr. Centor's testimony as one of the grounds for the affirmance. Tuggle v. Commonwealth, 228 Va. 493, 517, 323 S.E.2d 539, 554 (1984) (Tuggle I). The court rejected Tuggle's claim that he was entitled to psychiatric assistance in his capital sentencing and found that he had waived his Sixth Amendment rights when he spoke with Dr. Centor at Central State Hospital. The Court also found that there was sufficient evidence to convict Tuggle of rape and that the "vileness" instruction delivered to his jury was not unconstitutionally vague. With respect to his numerous claims that his right to impartial jury was violated, the court upheld the trial court's refusal to allow individualized voir dire on the effect of the jurors' exposure to

inaccurate press and also affirmed the trial court's refusal to allow any voir dire concerning pre-trial contact of jurors by the Sheriff and local media. The court did note that the trial court's refusal to allow challenges for cause was contrary to law, but found that Tuggle's counsel had not adequately preserved the issue because they did not separately proffer which jurors they would have challenged.

This Court granted Tuggle's certiorari petition, vacated the judgment in his case and remanded the case to the Virginia Supreme Court in light of the decision in Ake v. Oklahoma, 470 U.S. 68 (1985). Tuggle v. Virginia, 471 U.S. 1096 (1985). On remand, the Virginia Attorney General conceded that Tuggle must be re-sentenced because of the Ake error. The Virginia Supreme Court refused to accept the concession. Although it acknowledged the Ake error and struck down the "future danger" aggravating circumstance, it held that the jury's finding of "vileness" was sufficient by itself to affirm the death sentence under Virginia's "non-weighting" capital sentencing structure, citing Zant v. Stephens, 462 U.S. 862 (1983). Without evaluating the effect that the psychiatric testimony and argument might have had on the sentencing jury in its analysis of the "vileness" circumstance and in its discretionary decision to impose the death penalty, the Virginia Supreme Court re-affirmed the sentence. Tuggle v. Commonwealth, 230 Va. 99, 110-11, 334 S.E.2d 838, 845-46 (1985) (Tuggle II), cert denied, Tuggle v. Virginia, 478 U.S. 1010 (1986). In affirming the death sentence, the court did not perform the proportionality and arbitrariness

review required by Virginia statute. Va. Code § 17.2-110.1(C).

C) Tuggle's Habeas Corpus Proceeding

Tuggle filed his petition for state habeas corpus relief in October 1986. The petition was denied in March 1991 and his appeal to the Virginia Supreme Court was unsuccessful.<sup>5</sup> In September 1992, Tuggle filed a federal habeas corpus petition in the United States District Court for the Western District of Virginia. On June 8, 1994, the district court granted his habeas petition on seven independent grounds, finding that the circumstances of Tuggle's trial demonstrated an "extreme willingness to sidestep petitioner's constitutional rights to ensure a conviction." Tuggle v. Thompson, 854 F. Supp. 1229, 1239 (W.D. Va. 1994). The court found that Tuggle's trial was constitutionally improper for the following reasons: 1) the failure of the trial court to appoint Tuggle an independent psychiatric expert to assist in his sentencing defense violated Ake v. Oklahoma; 2) the combination of inaccurate publicity, prosecutorial criticism of jurors, pre-trial contact of jurors by the media and Sheriff's Department, inadequate voir dire and refusal to allow Tuggle to challenge jurors for cause violated his right to trial by an impartial jury; 3) there was insufficient evidence to convict Tuggle of the rape element of his capital charge; 4) the testimony of Dr. Centor at Tuggle's sentencing was improper because it was based on discussion with Tuggle outside the presence of counsel without an effective waiver

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<sup>5</sup> Tuggle filed a petition for writ of certiorari in this Court after the completion of his state habeas proceedings, but the petition was denied. Tuggle v. Bair, 503 U.S. 989 (1992).

of his Fifth and Sixth Amendment rights; 5) the "vileness" instruction given to Tuggle's sentencing jury was unconstitutionally vague; 6) the trial court's restrictions on the efforts of Tuggle's counsel rendered them unable to provide effective representation of their client; 7) the Virginia Supreme Court denied Tuggle "meaningful appellate review" when it considered his case on remand from the United States Supreme Court without following its own statutory procedures governing the review of death sentences.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court on all seven grounds and ordered that Tuggle's habeas petition be dismissed. Tuggle v. Thompson, 57 F. 3d. 1356 (4th Cir. 1995).<sup>6</sup> The appellate court did not dispute that Tuggle's sentencing was infected with constitutional error. It excused the Ake v. Oklahoma and Estelle v. Smith violations, however, by invalidating the "future dangerousness" aggravating circumstance and holding that the jury's "vileness" finding was sufficient, in and of itself, to support the death sentence.

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<sup>6</sup> The Fourth Circuit Opinion failed to even discuss two of the grounds for relief found by the district court--that Tuggle's trial counsel were rendered ineffective by the restrictions placed on their defense and that the Virginia Supreme Court deprived Tuggle of "meaningful appellate review" in its decision affirming his death sentence in Tuggle II. Given that the Court of Appeals ordered that the petition be dismissed, Tuggle assumes that the District Court's rulings on these grounds were reversed.

#### REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's Holding that this Court's Opinion in Zant v. Stephens Cured Admitted Constitutional Error in Tuggle's Capital Sentencing Conflicts with, Other Controlling Decisions of this Court, and Decisions of the Eleventh Circuit and the Virginia Supreme Court.

Certiorari on this question should be granted because the Opinion below conflicts with previous opinions of this Court, a decision of the United States Court of Appeals for the Eleventh Circuit and a recent decision of the Virginia Supreme Court. Sup. Ct. Rule 10(a) and (c).

All courts that have considered this case have now acknowledged that Tuggle's capital sentencing was unconstitutional. The proceeding violated Ake v. Oklahoma, 470 U.S. 68 (1985) because the trial court allowed the state to introduce psychological evidence in support of the "future dangerousness" aggravating circumstance while forbidding Tuggle to retain an expert witness to counter that testimony and support his own defense in mitigation. The district court also found that the proceeding violated Estelle v. Smith, 451 U.S. 454 (1981) because the doctor who provided the state's "future dangerousness" testimony examined Tuggle on the subject without notice to counsel, in violation of a court order limiting his examination to Tuggle's sanity at the time of the offense and his competence to stand trial.<sup>7</sup>

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<sup>7</sup> The District Court rejected the Virginia Supreme Court's ruling that Tuggle had waived his constitutional rights in submitting to the interview on "future dangerousness." 854 F.Supp. at 1243. This ruling of the District Court was not challenged by the Court of Appeals.

The Court of Appeals did not contest that these constitutional violations occurred. Instead, it held that the jury's finding that Tuggle's crime was "vile" was sufficient, in itself, to validate his death sentence. The Opinion based this ruling purely on Zant v. Stephens, 462 U.S. 862 (1983).

In Zant, a capital sentencing jury received instructions on three aggravating circumstances, including that the defendant had been previously convicted of a "substantial number of serious assaultive offenses." The state presented no evidence on the controverted circumstance that was not otherwise properly before the jury. Pursuant to Georgia law, which, like Virginia law, makes the finding of one or more aggravating circumstances the sole prerequisite to an entirely discretionary jury sentencing decision, the jury opted for death based on the evidence before it.

On appeal, the Georgia Supreme Court struck down the noted aggravating circumstance as unconstitutionally vague, but upheld the death sentence on the ground that the other two aggravating circumstances allowed the jury to invoke its full sentencing discretion. The Georgia court emphasized that the aggravating circumstance finding affected only the threshold determination of whether the defendant was eligible for the death penalty and that once that threshold was crossed by a single valid aggravator, it was the evidence, and not the number or weighing of aggravating circumstances, that informed the jury's sentencing discretion.

In reviewing the death sentence in Zant, this Court noted that the ability of an appellate court to uphold a death sentence after

eliminating an aggravating circumstance in a "non-weighing" state depends "on the reasons that the aggravating circumstance . . . was found to be invalid." Zant, 462 U.S. at 864. Critical to such an analysis is a determination as to whether the invalid aggravating circumstance affected the overall pool of evidence considered by the jury in making its discretionary sentencing decision. Under the facts present in Zant, the evidence supporting the stricken aggravating factor was "fully admissible at the sentencing phase" for purposes other than establishing that circumstance. Zant, 462 U.S. at 886. The Court accordingly upheld the death sentence because:

. . . any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he had been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant. . . . This case involves a statutory aggravating circumstance, invalidated by the state Supreme Court on grounds of vagueness, whose terms plausibly described aspects of the defendant's background that were properly before the jury and whose accuracy was unchallenged.

Id. at 887 (emphasis added; citations and footnotes omitted). The Court clearly stated, however, as the State of Georgia conceded, that "if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented." Id. at 887 n.24."

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\* This language from Zant, which is at the heart of that case, was repeatedly pressed on the Court of Appeals in Tuggle's case. The Fourth Circuit's Opinion fails to distinguish or even mention it, even though earlier decisions of that court had recognized the principle. See e.g., J. Briley v. Bass, 750 F.2d 1238, 1245 n. 12 (4th Cir. 1984) (rejecting challenge to Virginia "vileness" aggravating circumstance because of separate "future dangerousness"

The instant petition presents exactly the "different case" that the Zant Court contemplated, namely, a death sentence issued following jury consideration of an evidentiary pool poisoned by "material evidence not properly before the jury," *i.e.*, the psychiatric testimony obtained following Dr. Centor's secret, uncounseled interview with Tuggle. Indeed, this case presents a more serious challenge to the death sentence than that contemplated in Zant because the admitted constitutional errors not only allowed introduction of improper evidence at sentencing, but also prevented Tuggle from rebutting the improper evidence and putting on his own sentencing defense. Thus, the decision below derives no support from Zant, but is instead directly in conflict with that decision. In fact, Zant compels relief here, as the District Court concluded:

In this case, it cannot be said that the evidence presented to the jury was unaffected by the "future dangerousness" aggravating circumstance stricken by the Virginia Supreme Court. Because the state tried Tuggle on the "future dangerousness" aggravator, the jury did hear psychological testimony that Tuggle posed a serious threat to society. And, because the state committed the constitutional error of not granting Tuggle's request for psychiatric assistance, the jury did not hear testimony from Tuggle to rebut the future dangerousness claim. Thus, unlike Zant, the material presented to the Tuggle sentencing jury was seriously skewed because of the constitutional error.

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finding; court applies Zant only after concluding that "no evidence was introduced on "vileness" separately at the penalty stage of the bifurcated trial; rather, the jury's verdicts on that circumstance were necessarily based upon the evidence of the murders admissible at the guilt stage").

In Tuggle's case, the Ake violation put improper and highly prejudicial material before his sentencing jury. The Commonwealth cites no case in which a court has found that an Ake violation was cured because there were other statutory aggravating circumstances. This fact is explained because an Ake violation cannot be cured by a mere review of the record. The violation, by depriving a defendant of needed assistance, thwarts his very ability to make a record on a critical point or even to rebut the evidence marshalled against him.

854 F. Supp. at 1237-38 (emphasis in original).

This Court reiterated the Zant principle in Johnson v. Mississippi, 486 U.S. 578 (1988). App. 347. In Johnson, a jury sentenced the defendant to death after finding three statutory aggravating circumstances, including that the petitioner previously had been convicted of another felony involving violence. The Supreme Court vacated the death sentence because the previous felony relied upon in establishing the "prior violent felony" aggravating circumstance was an uncounseled conviction, obtained in violation of the constitution. The state attempted to justify affirmation of the death sentence using the same Zant v. Stephens argument made by the Commonwealth here, *i.e.*, that there were other valid aggravating circumstances that would independently support the sentence. The Court unanimously rejected the argument, however, relying directly on Zant and noting that the error "extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 486 U.S. at 590.

Simply put, if aggravating evidence before the sentencing jury was unconstitutionally admitted and/or inaccurate, the presence of valid aggravating circumstances serves as no cure.

The Court of Appeals distinguished Johnson v. Mississippi simply by noting that "Mississippi uses the weighing system and Virginia does not." 57 F.3d at 1363. This perfunctory reference ignored the fact that the Johnson Court relied heavily on Zant in striking the death sentence, even though Zant was a decision from a non-weighing state like Virginia. This Court's jurisprudence establishes that, whether in a weighing state or non-weighing state, the evidence to be evaluated by a jury in reaching its sentencing decision cannot be tainted by constitutional error. See e.g., Richmond v. Lewis, 113 S.Ct. 528 (1992); Sochor v. Florida, 504 U.S. 577 (1992); Stringer v. Black, 593 U.S. 222 (1992); Clemons v. Mississippi, 494 U.S. 738 (1990). While the difference between weighing and non-weighing sentencing schemes is significant in some instances, neither system allows the casual admission of unconstitutional, admissible and inflammatory sentencing evidence, nor excuses a trial court that deprives a capital defendant of the "basic tools of an adequate defense." Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (citations omitted).

The United States Court of Appeals for the Eleventh Circuit reversed a death sentence from a non-weighing state under strikingly similar conditions in Buttrum v. Black, 908 F.2d 695 (11th Cir. 1990). The state had introduced psychological testimony on "future dangerousness" against the capital defendant and then

deprived the defendant of a meaningful opportunity to present expert assistance to counter the testimony and support her defense. As in this case, the state's "future dangerousness" testimony was developed surreptitiously by a psychologist ordered to investigate only the defendant's competence and sanity. The appellate court adopted a district court opinion which granted habeas relief on the grounds that (1) the state testimony violated Estelle v. Smith, and (2) the failure to allow the defendant the full assistance of an expert to counter that testimony violated Ake v. Oklahoma. Buttrum v. Black, 721 F. Supp. 1268, 1308-14 (N.D. Ga. 1989). Because of these errors, a re-sentencing was ordered even though the sentencing jury found two aggravating circumstances in the case that were not impaired by constitutional errors.

Even the Virginia Supreme Court now recognizes that death sentences cannot stand under these circumstances. In Mickens v. Commonwealth, 249 Va. 423, 457 S.E.2d 9 (April 21, 1995) (Attached as Appendix F), the defendant was charged with capital murder. In a pretrial motion, Mickens contended that he was entitled to inform the jury of his parole ineligibility, but the trial court denied the motion. The jury later convicted Mickens of capital murder based both on the "vileness" and "future dangerousness" aggravating circumstances. The Virginia Supreme Court affirmed his death sentence and Mickens petitioned this Court for a writ of certiorari. The writ was granted and this Court vacated the judgment, remanding it for further consideration in light of Simmons v. South Carolina, 114 S.Ct. 2187 (1994).

Simmons had held that, when future dangerousness is at issue in the sentencing phase of a capital trial, the jury is entitled to be informed of the defendant's parole ineligibility. On remand, the Virginia Supreme Court recognized that the Simmons error affected the "future dangerousness" aggravator in that Mickens should have been allowed to inform the jury of his parole eligibility. Despite the existence of a separate "vileness" finding, and despite the Commonwealth's argument that the "vileness" finding rendered the constitutional error superfluous, the Virginia Supreme Court found that the constitutional error altering the sentencing evidentiary record entitled the petitioner to be re-sentenced.

The decision below is thus in square conflict with the decisions of this Court, the Eleventh Circuit, and the Virginia Supreme Court. No other court has ever held that the Zant rationale can excuse Ake or Estelle error committed during the sentencing phase of a capital trial. Lest Zant be interpreted as a blanket excuse for all manner of constitutional violations in capital sentencing proceedings, the Court should grant certiorari.

2. The Fourth Circuit's Holding that Virginia Courts Properly Affirmed the Petitioner's Death Sentence Under the Sentencing Jury's "Vileness" Finding is in Conflict with Decisions of this Court.

Certiorari should be granted on this question because the Court of Appeals' affirmance of Virginia's "vileness" aggravating circumstance is contrary to this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) and subsequent cases. Sup. Ct. Rule

10(c). The Virginia statutory circumstance is indistinguishable from others that this Court has struck down and the Virginia Supreme Court has done nothing to sufficiently narrow its application. This claim is particularly important because lower courts have acknowledged that the "future dangerousness" aggravating circumstance in Tuggle's sentencing was invalid and his death sentence now rests solely on the "vileness" circumstance.

The Eighth and Fourteenth Amendments require statutory aggravating factors to meet two standards to justify a death sentence. First, "the aggravating circumstance may not be unconstitutionally vague" -- that is, it must have a "'common-sense core of meaning . . . that criminal juries should be capable of understanding.'" Tuilaepa v. California, 114 S.Ct. 2630, 2635-36 (1994) (citing Godfrey v. Georgia, 446 U.S. 420, 428, (1980), and Arave v. Creech, 113 S.Ct. 1534, 1541 (1993), and quoting Jurek v. Texas, 428 U.S. 262, 279 (1976) (White, J., concurring)). Second, "the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepa v. California, 114 S.Ct. at 2635 (citing Arave, 113 S.Ct. at 1542). The Virginia statute fails to meet either prong of this test.

The Virginia statute provides that a person convicted of capital murder may be sentenced to death if his or her conduct is found to be "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code § 19.2-264.2 (Repl. Vol. 1995).

In Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), this Court held that a vileness aggravating factor identical to Virginia's was unconstitutionally vague and overbroad on its face.<sup>9</sup> Even the Virginia Supreme Court has conceded that Virginia's "vileness" provision is identical to the Georgia provision at issue in Godfrey. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978).

A statutory aggravating circumstance that is too vague as stated can nevertheless be used if the jury is given a tightly drawn definition instruction, or if the state appellate court reviews the particular finding with a consistent and narrow appellate construction. See e.g., Walton v Arizona, 497 U.S. 639, 653 ("when a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutional on its face."); Maynard v. Cartwright, 486 U.S. 356 (1988). Neither occurred here.

The Virginia Supreme Court, recognizing that "any act of murder arguably involves a 'depravity of the mind' and 'an aggravated battery to the victim,'" developed a limiting construction of its "vileness" aggravating circumstance that is

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<sup>9</sup>In other cases, this Court has held that vague, pejorative adjectives are not constitutionally sufficient absent well-drawn limiting instructions. Sochor v. Florida, 504 U.S. 527 (1992) ("heinousness" or "coldness"); Shell v. Mississippi, 498 U.S. 1 (1990) ("especially heinous, atrocious, or cruel"); Maynard v. Cartwright, 486 U.S. 356 (1988) (same).

often given to juries in capital cases. Smith v. Commonwealth, 219 Va. at 478. The construction provides the following definitions for the statutory terms "aggravated battery" and "depravity of mind":

. . . we construe the words "depravity of mind" as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words "aggravated battery" to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

Id.<sup>10</sup> Here, Tuggle's counsel requested that the terms "aggravated battery" and "depravity of mind" be defined as set forth in Smith, but the trial court refused to give even that minimal instruction. Instead, it simply read the jury the vague statutory language, adding an additional clause as shown:

That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

Tuggle v. Thompson, 57 F.3d at 1371. Neither the terms "aggravated

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<sup>10</sup> This limiting construction was not given as an instruction to Tuggle's sentencing jury or utilized by the Virginia Supreme Court during appellate review. Even if it had been used, the construction would not solve the invalidity of the Virginia "vileness" aggravating circumstance. Rather than creating a specific and well-defined class of murders for which the death penalty is appropriate, these minimal definitions create a single hypothetical murder for which the death penalty may not be imposed and allow the death penalty in all other cases where the theoretical minimum is exceeded. See Shell v. Mississippi, 498 U.S. 1 (1990) (appellate limiting construction still too vague to cure vague aggravating circumstance).

battery" nor "depravity of mind" were defined.

The trial court's reading of the statutory language, with the brief addition, did not cure the unconstitutionality of the "vileness" aggravating circumstance. In Godfrey, this Court recognized that instructing the jury with the essentially identical statutory language was insufficient because "a person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Id. at 429. Similarly, in Maynard v. Cartwright, 486 U.S. 356 (1988), the Court held that a jury instruction repeating Oklahoma's "especially heinous, atrocious, or cruel" statutory language violated the Eighth and Fourteenth Amendments because the term "especially heinous" provided no guidance to the jury and that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Id. at 364.

In Shell v. Mississippi, 498 U.S. 1 (1990), the Supreme Court found unconstitutional a limiting instruction that was far more specific and detailed than that given in Tuggle's case to qualify the phrase "aggravated battery." In Shell, the trial court gave a limiting instruction defining Mississippi's "especially heinous, atrocious, or cruel" aggravating factor which stated that the "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict high degree of pain with indifference to, or even enjoyment of the suffering of others." Id. at 2. (Marshall, J., concurring). The Supreme Court held that this instruction was "not

constitutionally sufficient." Id. at 1. If the Shell limiting instruction was constitutionally infirm, then the Tuggle court's cryptic "beyond the minimum necessary to accomplish the act of murder" cannot be found to meet the standards of specificity imposed by the Eighth and Fourteenth Amendments.

Just as the trial court failed to limit the vague Virginia aggravating circumstance through a jury instruction, the Virginia Supreme Court failed to channel the "vileness" factor in its review on direct appeal.<sup>11</sup> In reviewing Tuggle's death sentence under the vileness predicate, the Virginia Supreme Court failed to even apply the minimal Smith definitions of the term's "depravity of mind" and "aggravated battery", noting that the Smith definitions "are not necessarily the best or the only definitions for these terms." Tuggle, 228 Va. at 516. Instead, the court merely stated that the crime for which Tuggle was convicted was "outrageously vile and involved depravity of the mind." Id. at 517. Without any explanation or detailed analysis, the court also summarily

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<sup>11</sup>The Virginia Supreme Court has never reversed a case in which the imposition of the death penalty relied upon the "vileness" aggravator. See, e.g., Mueller v. Commonwealth, 244 Va. 386, 422 S.E.2d 380 (1992), cert. denied, 113 S.Ct. 1880 (1993); Stewart v. Commonwealth, 245 Va. 222, 427 S.E.2d 394, cert. denied, 114 S.Ct. 143 (1993); Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656, cert. denied, 113 S.Ct. 423 (1992); Thomas v. Commonwealth, 244 Va. 1, 419 S.E.2d 606, cert. denied, 113 S.Ct. 421 (1992); Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595, cert. denied, 491 U.S. 910 (1989); Turner v. Commonwealth, 234 Va. 543, 552 & n.2, 364 S.E.2d 483 (1988), cert. denied, 486 U.S. 1017 (1988); Boggs v. Commonwealth, 229 Va. 501, 331 S.E.2d 407 (1985), cert. denied, 475 U.S. 1031 (1986); and Jones v. Commonwealth, 228 Va. 427, 323 S.E.2d 554 (1984), cert. denied, 472 U.S. 1012 (1985); Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815, cert. denied, 474 U.S. 865 (1985).

concluded that "the battery to the victim was aggravated and "more culpable than the minimum necessary to accomplish an act of murder." Id. If the statutory language is itself unconstitutional, the appellate court can hardly create an appropriate narrowing construction merely by repeating that language.

The Court of Appeals upheld the validity of the "vileness" finding on the grounds that the trial court instruction "paraphrased" the definition of "aggravated battery" set forth in Smith v. Commonwealth and that the Smith limitation was in accord with Godfrey. 57 F.3d at 1372. The Opinion failed to mention the Virginia Supreme Court's refusal to fully apply the Smith v. Commonwealth standard and omitted the fact that no definition of "depravity of mind" was given to the jury.

This Court has plainly declared that aggravating circumstances with language identical to Virginia's "vileness" circumstance are too vague to provide appropriate constitutional guidance in capital sentencing decisions. The failure of Virginia courts to provide a sufficiently narrow definition of the "vileness" factor in this case warrants a grant of certiorari.

3. The Fourth Circuit's Holding that Individualized Voir Dire was Not Required to Explore the Impact of Prosecutorial Criticism of Jurors, Press Contact of Jurors and Prejudicial Pre-Trial Publicity is Contrary to this Court's Rulings in Virginia Capital Cases.

Certiorari should be granted on this question because the

Opinion below is contrary to two cases from this Court, both of which dealt with the scope of voir dire required in Virginia capital cases to protect a defendant's right to trial by an impartial jury. Mu'Min v. Virginia, 500 U.S. 415 (1991); Turner v. Murray, 476 U.S. 28, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). Sup. Ct. R. 10(c).

Tuggle's case was the most notorious case in the history of Smyth County, Virginia. There was substantial press in the rural area prior to trial and some press accounts contained critically inaccurate reports that Tuggle had previously been convicted of rape and was a suspect in the rape of a young girl from the area. Ten members of his jury venire had been exposed to this press and four of the sitting trial jurors had read the articles with the false rape information. Given that Tuggle's offense was only charged as capital murder because of the rape allegation, this inaccuracy was very prejudicial. When coupled with the weakness of the state's rape evidence, and the trial court's refusal to allow Tuggle expert assistance to counter the state's pathologist, this inaccurate rape publicity assumed a serious dimension in this case.

In addition, members of the Tuggle jury panel were contacted by the press less than three days before the trial after the county prosecutor ridiculed them publicly for committing a "travesty of justice" by handing out a reduced verdict in another murder case. These bizarre contacts suggested that a "lenient" ruling in Tuggle's case would expose the jurors to public criticism in their small community. Five members of Tuggle's jury venire had served

in that previous case and one of those people, Robert Brown, publicly criticized the leniency of the previous verdict. Brown eventually was made foreman of the Tuggle jury.

The trial court refused to allow any voir dire questions concerning the prosecutorial comment and pre-trial media contacts even though Tuggle's counsel argued that these events were intimidating. The trial court also refused to allow individualized voir dire concerning pre-trial press exposure and failed to allow any questions about the contents of articles read by the jury. Without such questions, Tuggle's counsel could not explore the extent to which jurors were affected by the inaccurate rape information. Despite the serious nature of the capital case, the trial court even refused to allow Tuggle to challenge any jurors for cause, a clear violation of state law.

In Turner v. Murray, 476 U.S. 28 (1986), this Court recognized the critical role that voir dire plays in ensuring the impartiality of a capital sentencing jury. Even though the Court has recognized that the constitution does not require voir dire concerning racial prejudice in criminal cases generally, Turner held that the nature of racial prejudice, the broad discretion accorded to a Virginia capital sentencing jury and the heightened reliability required in capital cases all compelled that such voir dire was constitutionally required in capital cases involving interracial crime.

In Mu'Min v. Virginia, 500 U.S. 415 (1991), the Court narrowly declared that the Sixth and Fourteenth Amendments did not always

require individualized voir dire concerning pre-trial publicity in a capital case, although it recognized that certain circumstances, such as the rural nature of the area where the crime occurred, might command the need for individualized voir dire in some cases. Mu'Min v. Virginia, 500 U.S. at 29.

The combined teachings of Mu'Min and Turner establish a few important principles. First, while voir dire is always a critical feature in protecting the Sixth Amendment guarantee to an impartial jury, it has heightened importance in a capital sentencing where the jury has broad discretion, such as that allowed by the Virginia death penalty statute. Turner v. Murray, 476 U.S. at 33-36. Second, to the extent that a capital case presents a special feature that may threaten the reliability of the jury's deliberation (e.g., racial animus), the constitution requires that voir dire be allowed on that particular feature in order to protect the integrity of the proceeding. Id. (citing Caldwell v. Mississippi, 472 U.S. 320 (1985)). Finally, while individualized, content-specific voir dire is not required in all, or even most, capital cases, the absence of such inquiry cannot be tolerated constitutionally if the facts of the case demonstrate that such questioning is the only way to protect the impartiality of the jury. The Court of Appeals rejected Tuggle's impartial jury claim without citing either Turner or Mu'min, both of which had been relied on by the District Court.

In Tuggle's case, the trial court ignored protections that are accorded to litigants in most minor civil trials in Virginia.

Allowing voir dire on prosecutorial criticism, pre-trial media contacts or on the jurors' recollection of inaccurate press reports, and letting the defense challenge jurors for cause, would have imposed no burden in Tuggle's trial. The trial court's refusal to accord these minimal protections demonstrated that, contrary to Turner, the capital proceeding did not receive the heightened protection that is constitutionally required. If anything, the unpopularity of the defendant led the trial court to provide fewer protections than in normal cases.

Certiorari is appropriate here to vindicate this Court's principle that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-9 (1983).

4. The Inability of the State's Pathologist to Determine Whether there was Penetration Compels the Conclusion that no "Rational Trier of Fact" Could have found Tuggle Guilty of Murder during the Commission of Rape.

Certiorari should be granted on this question because the Opinion below directly conflicts with the essential holding of Jackson v. Virginia, 443 U.S. 307 (1979). Sup. Ct. Rule 10(c). That case holds that the sufficiency of evidence supporting a conviction can only be challenged in a federal habeas corpus petition "if it is found upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt." 443 U.S. at 324. This case poses the

fundamental question of whether a "rational trier of fact," hearing medical testimony months after the crime, can find proof of rape beyond a reasonable doubt when the state's medical witness delivering the testimony explicitly testifies that he cannot find such proof.

Tuggle was charged with murder during the commission of rape. Had the murder charge been unaccompanied by the alleged rape, it would not have been capital murder in Virginia. Thus, the element of rape was critical to this case. Testimony established that the victim left a club voluntarily with Tuggle and the two were later stopped, without incident, by a state trooper. Tuggle v. Commonwealth, 228 Va. 493, 500-501, 323 S.E.2d 539, 543 (1984). When the victim's body was found four days later, her jeans were pulled down to mid-thigh. App. 122. Semen was found in the victim's rectum, although there was no bruising or injury there. Id. No semen was found in or around the victim's vagina. App. 133. There were small bruises found outside the vagina, but there were no injuries found in the vagina and there was no testimony concerning when the bruises had occurred. App. 139, 143.

Dr. Oxley, the state pathologist, was the sole witness at trial concerning the rape charge. He first testified in the preliminary hearing that the condition of the vagina suggested either "manipulation or penetration of some type" and he stated that the cause was "just as likely" manipulation as penetration. App. 13-20. At trial, Oxley volunteered on direct examination that the bruises indicated penetration of the vagina by "something, a

penis, a finger, an object, something." App. 124. But, on cross examination, he readily admitted that the bruises could have been caused by "manipulation or penetration". App. 143.

In Virginia, forcible penetration of the vagina by the defendant's penis is a necessary element of rape and the absence of semen in the vagina is a "strong circumstance" demonstrating a lack of penetration. McCall v. Commonwealth, 192 Va. 422, 65 S.E.2d 540 (1951). Here, the lack of semen or spermatozoa in or around the vagina is a strong circumstance that penetration of the vagina by the defendant's penis did not take place. The sole evidence of rape was introduced by the state through the testimony of Dr. Oxley, who, unlike the jury, was a trained pathologist and had examined the victim's body shortly after the crime. Because he could not decide whether there had even been penetration of any kind, much less penetration by the defendant's penis, no "rational trier of fact" could have found such proof beyond a reasonable doubt.

The District Court granted habeas relief on this ground, finding that the evidence was clearly insufficient to establish rape. It noted that the jury's finding of rape was "most likely explained by the inaccurate pre-trial information concerning other rapes supposedly committed by Tuggle, as well as the public pressure surrounding this notorious case, which was heightened by press contacts with jurors prior to trial." 854 F. Supp. at 1241. The Court of Appeals reversed, citing the state's testimony concerning penetration and concluding that it was "for the jury to

say" whether rape had occurred. 57 F.3d at 1370. The Court of Appeals ignored, however, the state expert's clear equivocation as to whether penetration had even occurred.

While this issue is factual, it poses a fundamental question concerning the meaning of Jackson v. Virginia. Can a "rational trier of fact" find proof beyond a reasonable doubt when the state's own evidence admittedly fails to reach that standard?

### CONCLUSION

Because the Petitioner was charged with capital murder, this Court's teachings compelled special attention by the trial court to the integrity of his trial. Instead of heightened protection, Tuggle's trial was notable for its startling departures from elemental principles of fairness. Jurors were exposed to critically inaccurate publicity, criticized by the prosecution for their leniency and contacted by the media, but Tuggle's requests for the standard protections of adequate voir dire and challenges for cause were refused. Unconstitutional evidence was obtained and introduced against Tuggle in that most sensitive of proceedings, his capital sentencing, but his own motion to obtain constitutionally required assistance at his own cost was denied. Standard jury instructions needed to inform the jury of its role in sentencing were refused. These instances were not random events; as the District Court found, they were part of a consistent pattern of misconduct designed to "ensure a conviction" of an unpopular defendant.

The check against such excess is appellate review and habeas corpus. That check has been oddly ineffective in this case. All courts have acknowledged that, at the very least, Tuggle's sentencing was unconstitutional. But, despite that recognition, and despite the unique concession by the Virginia Attorney General that Tuggle should be re-sentenced, he now stands three days from execution.

The pattern of misconduct is clear in the record--there is little dispute on factual questions. The judicial recognition of constitutional error is also clear, beginning with this Court's grant of certiorari ten years ago. All that remains is a decision about whether that misconduct, that acknowledged error, can be excused. Petitioner respectfully requests that this Court grant him certiorari for the reasons stated here.

Respectfully Submitted,

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Certificate of Service

I, Donald R. Lee, Jr., a member of the Bar of this Court, hereby certify that, pursuant to Supreme Court Rule 29, I had a copy of the foregoing Petition for Writ of Certiorari, with Appendix, hand-delivered to Donald R. Curry, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219 on this 18th day of September, 1995.

Donald R. Lee, Jr.